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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>RODERICK O. FONSECA,<br><br>Defendant and Appellant. | B215823<br><br>(Los Angeles County<br>Super. Ct. No. LA056786) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Martin Herscovitz, Judge. Affirmed.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

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Roderick Olaf Fonseca appeals his conviction for aggravated sexual assault of a child in violation of Penal Code[1] section 269, subdivision (a)(1) based on an act of rape as defined under Penal Code section 261, subdivision (a)(2)—sexual intercourse accomplished against a person's will by means of force, violence, duress, menace or fear of immediate and unlawful bodily injury. Before this court, Fonseca asserts that sufficient evidence did not support his conviction on Penal Code section 269, subdivision (a)(1) because there was no evidence that he committed rape by means of force, violence, duress, menace or fear of immediate and unlawful bodily injury because victim was asleep when he raped her. As we shall explain here, based on our review of the evidence in the light most favorable to the judgment we find the record supports Fonseca's conviction on Count 2. The victim woke up during the crime, and Fonseca continued his conduct for a short period of time while the victim was awake. Thus, Fonseca was properly charged under Penal Code section 261, subdivision (a)(1). Accordingly, we affirm the judgment of conviction.

***FACTUAL AND PROCEDURAL BACKGROUND***

In late 2006, K.S. the victim in this case was 13 years old. At the time she was in elementary school in the 6th grade taking special education classes because of her "learning disabilities." She was described as mentally slow for her age and was not sexually active. K.S. has eight siblings and her family are Chumash Indians who participate in a Native American drumming group. She and her family perform at Native American powwows.

Just before Christmas in 2006, K.S. and her family traveled to the Los Angeles area to participate in a powwow in Northridge. During the event they stayed at the home of a family friend, Cheri Howlett.

Fonseca, who was 32 years old at the time, knew K.S. and her family. Fonseca also participated in the drumming group that performed at the powwows. Fonseca attended the powwow in December 2006 and he also stayed with Howlett at the same

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1 All statutory references are to the Penal Code unless otherwise indicated.

time K.S. and her family stayed in the home. While at Howlett's home, K.S.'s parents slept in a bedroom, K.S. slept on a couch in the living room and her younger siblings slept on the floor in the living room. Fonseca also slept in the living room on another couch or chair.

On the night of the incident at issue, K.S. had gone to sleep on the couch of Howlett's living room clothed in long overalls, shirt, bra and underwear. She woke up in the middle of the night, naked with Fonseca on top of her. She testified that he was also naked and was "sitting" on her legs. She stated that his penis was inside of her vagina. Fonseca said to her: "I'll make you feel like a woman." K.S. did not respond and was too scared to scream. She further testified that Fonseca remained on top of her for a "short" period of time and that she managed to push him off and that he fell to the floor.

K.S. ran into the bathroom. She had an itchy and burning sensation when she urinated and noticed a white gooey liquid from her vaginal area. She testified that she did not want to have sex with Fonseca and hid in the bathroom. She was too frightened to leave the bathroom until she heard her parents' voices in the morning. She did not tell her parents what had happened at first because she was too frightened. Later when she and her family returned to Howlett's house after the powwow, K.S. did not want to go back into the house because she was afraid of Fonseca and at that point told her father what Fonseca had done to her. K.S.'s father told his wife about the situation a few days later; however, they did not report it to police.

After the incident, K.S. began feeling sick and began regularly vomiting. K.S.'s father took her to the doctor, who determined that K.S. was pregnant.[2] K.S.'s parents notified the police.

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[2] K.S. subsequently gave birth to a baby boy in September 2007. Police subsequently analyzed the DNA of K.S., her son and Fonseca. Based on a comparison of the DNA profiles, Fonseca could not be excluded as the biological father of the baby: "[t]he probability of paternity is 99.99 percent, as compared to an untested, unrelated male of North American Hispanic population."

Fonseca was arrested and charged in Count 1 with lewd conduct upon K.S. in violation of section 288, subdivision (a) and in Count 2 aggravated sexual assault of K.S. as proscribed under section 261, subdivision (a)(2), in violation of section 269, subdivision (a)(1). As to each count it was further alleged that Fonseca inflicted great bodily injury upon the minor (section 667.61, subdivision (b) and section 12022.8), caused bodily injury within the meaning of section 1203.066, subdivision (a)(1), and had substantial contact with the victim within the meaning of section 1203.066, subdivision (a)(8).[3]

Following the trial, the jury found Fonseca guilty on both counts and found the bodily injury enhancements to be true. The court subsequently found the prior conviction enhancements true, and sentenced Fonseca to 40 years-to-life in prison.

Fonseca appeals.

***DISCUSSION***

Before this court, Fonseca argues that as a matter of law the evidence presented at trial did not support his conviction in Count 2[4] on section 269, subdivision (a)(1) for rape by means of force, violence, duress, menace or fear of immediate and unlawful bodily injury. He claims the crime was committed while K.S. was asleep and that when she awoke he did nothing further to her that would support a violation under section 261, subdivision (a)(2). Thus, he maintains he was mischarged by the prosecutor and that at most he might have been charged under section 261, subdivision (a)(4) proscribing rape of an unconscious person. As we shall explain, we do not agree with Fonseca's view of the evidence.

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[3] It was further alleged that Fonseca had a prior strike conviction for robbery in 1995 and had served a prior separate prison term.

[4] Fonseca does not challenge his conviction on Count 1-- lewd conduct upon K.S. in violation of section 288, subdivision (a).

**A. Standard of Review**

When determining whether the evidence was sufficient to sustain a conviction, "our role on appeal is a limited one." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "[T]he test of whether evidence is sufficient to support a conviction is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citations.]" (*People v. Holt* (1997) 15 Cal.4th 619, 667.) "We draw all reasonable inferences in support of the judgment." (*People v. Wader* (1993) 5 Cal.4th 610, 640.)

"The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] '"Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt."'" *(People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

A single witness's testimony is sufficient to support a conviction, unless it is physically impossible or inherently improbable. (*People v. Young* (2005) 34 Cal.4th 1149, 1181; *People v. Scott* (1978) 21 Cal.3d 284, 296; Evid. Code, § 411.) "Even when there is a significant amount of countervailing evidence, the testimony of a single witness that satisfies the [substantial evidence] standard is sufficient to uphold the finding." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.) "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the . . . jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 403.) Reversal is not warranted unless it appears that "'upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

**B. Sufficient Evidence Supported Fonseca's Conviction in Count 2.**

Fonseca was charged in Count 2 with violation of section 269, subdivision (a)(1) which provides in pertinent part: "Any person who commits any of the following acts upon a child who is under 14 years of age and seven or more years younger than the person is guilty of aggravated sexual assault of a child: . . . (1) Rape, in violation of paragraph (2) . . . . (a) of Section 261." (§ 269, subd. (a)(1).)

To prove the crime of rape in violation of section 261, subdivision (a)(2) requires proof that the crime was accomplished against the victim's will "by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person of another." (§ 261, subd. (a)(2).) These terms are variously defined either in the statute, or the relevant case law interpreting them.

The term "force" as used in this rape statute is not specifically defined. As the Supreme Court observed in *People v. Griffin* "the Legislature did not intend the term 'force,' as used in the rape statute, to be given any specialized legal definition. . . . [¶] Nor is there anything in the common usage definitions of the term 'force,' or in the express statutory language of section 261 itself, that suggests force in a forcible rape prosecution actually means force 'substantially different from or substantially greater than' the physical force normally inherent in an act of consensual sexual intercourse." (*People v. Griffin* (2004) 33 Cal.4th 1015, 1023 (*Griffin*), citing *People v. Cicero* (1984) 157 Cal.App.3d 465, 474.) The *Griffin* Court concluded that to establish force within the meaning of section 261, subdivision (2), the prosecution need only show the defendant used physical force of a degree sufficient to support a finding that the act of sexual intercourse was against the will of the victim. (*Griffin*, *supra*, 33 Cal.4th at pp. 1023-1024; *People v. Asencio* (2008) 166 Cal.App.4th 1195, 1200.)

"[T]he fundamental wrong at which the law of rape is aimed is not the application of physical force that causes physical harm. Rather, the law of rape primarily guards the integrity of a woman's will and the privacy of her sexuality from an act of intercourse undertaken without her consent. Because the fundamental wrong is the violation of a woman's will and sexuality, the law of rape does not require that 'force' cause physical

harm. Rather, in this scenario, 'force' plays merely a supporting evidentiary role, as necessary only to insure an act of intercourse has been undertaken against a victim's will." (*People v. Cicero*, *supra*, 157 Cal.App.3d 465, 475.) Thus, "[w]hen two adults engage in *consensual* sexual intercourse, whether with or without physical force greater than that normally required to accomplish an act of sexual intercourse, the forcible rape statute is not implicated. The gravamen of the crime of forcible rape is a sexual penetration accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury." (*Griffin, supra,* 33 Cal.4th at p. 1027.) "In a forcible rape prosecution the jury determines whether the use of force served to overcome the will of the victim to thwart or resist the attack, not whether the use of such force physically facilitated sexual penetration or prevented the victim from physically resisting her attacker. The Legislature has never sought to circumscribe the nature or type of forcible conduct that will support a conviction of forcible rape, and indeed, the rape case law suggests that even conduct which might normally attend sexual intercourse, when engaged in with force sufficient to overcome the victim's will can support a forcible rape conviction." (*Ibid.*)

Unlike the concept of "force," the Legislature expressly and specifically defined the terms "menace" and "duress" as utilized in section 261, subdivision (a)(2). As used in section 261 "menace" "means any threat, declaration, or act which shows an intention to inflict an injury upon another." (§ 261, subd. (c).)

"Duress" means "a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which one otherwise would not have submitted. The total circumstances, including the age of the victim, and his or her relationship to the defendant, are factors to consider in appraising the existence of duress." (§ 261, subd. (b); *People v. Cochran* (2002) 103 Cal.App.4th 8, 13-14.) In the analogous context of prosecutions for violation of section 288, subdivision (b), courts have held other relevant factors include threats to harm the victim, physically controlling the victim when the victim attempts to resist, and warnings

to the victim that revealing the molestation would result in jeopardizing the family. (*People v. Cochran*, *supra*, 103 Cal.App.4th at p. 14; *People v. Senior* (1992) 3 Cal.App.4th 765, 775; *People v. Schulz* (1992) 2 Cal.App.4th 999, 1005.) "Duress can arise from various circumstances, including the relationship between the defendant and the victim and their relative ages and sizes." (*People v. Senior*, *supra*, 3 Cal.App.4th at p. 775.) "'Where the defendant is a family member and the victim is young, . . . the position of dominance and authority of the defendant and his continuous exploitation of the victim' is relevant to the existence of duress." (*Ibid*.) The fact that the victim testifies the defendant did not use force or threats does not require a finding of no duress; instead, the victim's testimony must be considered in light of her age and her relationship to the defendant. (*People v. Cochran*, *supra*, 103 Cal.App.4th at p. 14.) Physical control can create duress without constituting force (*People v. Espinoza*, *supra*, 95 Cal.App.4th at p. 1319), and resistance to the attack is not an element of the crime. (*People v. Iniguez* (1994) 7 Cal.4th 847, 855 (*Iniguez*).)

"Fear of immediate and unlawful bodily injury" under section 261, subdivision (a)(2) may be inferred from the circumstances. The element of fear of immediate and unlawful bodily injury in forcible rape (§ 261, subd. (a)(2)) has two components, one subjective and one objective. The subjective component asks whether a victim genuinely entertained a fear of immediate and unlawful bodily injury sufficient to induce her to submit to sexual intercourse against her will, and the extent or seriousness of the injury feared is immaterial. The objective component concerns whether the victim's fear was reasonable under the circumstances, or, if unreasonable, whether the perpetrator knew of the victim's subjective fear and took advantage of it. (*Iniguez, supra,* 7 Cal.4th at pp. 856-857.) The victim's conduct after the rape is also relevant to demonstrate the subjective element of fear and that the act of intercourse was committed against the victim's will. (*People v. Maury* (2003) 30 Cal.4th 342, 403.) With these definitions in mind, we turn to Fonseca's arguments.

Here Fonseca asserts that K.S. was asleep when he committed the crime and that any "force" required to rape an unconscious person is qualitatively different from the

"force" necessary to commit the crime against a conscious person. Indeed, section 261, subdivision (a)(4) provides in relevant part that rape is an act of sexual intercourse accomplished with a person, "[w]here a person is at the time unconscious of the nature of the act, and this is known to the accused." (§ 261, subd. (a)(4).) "[U]nconscious of the nature of the act" means incapable of resisting because the victim was either "unconscious or asleep," or "[w]as not aware, knowing, perceiving, or cognizant that the act occurred." (*Id.*, subds. (a)(4)(A) & (B).) Thus, the use of "force" as that terms has been interpreted under section 261, subdivision (a)(2) appears to play no role in a violation of section 261, subdivision (a)(4). Consequently Fonseca contends that because K.S. was not conscious of the his actions any evidence supporting his use of "force" would have been insufficient as a matter of law to demonstrate "force" under the crime charged—section 261, subdivision (a)(2).

Fonseca's argument, whatever its merit, is simply beside the point in view of the evidence presented during the trial. If K.S. had remained asleep and unaware of the crime during its commission, then Fonseca might have an argument that his conduct could not support a conviction based on a rape proscribed by 261, subdivision (a)(2). But the evidence clearly shows that K.S. was not unconscious throughout the rape. She woke up and was conscious during the crime. Thus, Fonseca was properly charged under section 269, subdivision (a)(1) based on 261, subdivision (a)(2).[5] The issue remains, however, whether the evidence presented was sufficient to support a conviction under 261, subdivision (a)(2).

We conclude it is. Based on our review of the evidence in the light most favorable to the judgment we find the record supports Fonseca's conviction on Count 2. There was sufficient evidence from which a reasonable jury could infer that Fonseca committed rape by means of force, fear of injury, or duress.

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[5] Because K.S. was asleep during some part of the rape, Fonseca could also have been charged with a violation of section 261, subdivision (a)(4).

First as to evidence of "force," K.S. testified that she did not consent to having sex with Fonseca. She further stated that when she woke up during the rape, Fonseca was "sitting" on her with his penis in her vagina while she lay naked under him on the couch. Fonseca's conduct in holding her down on the couch, even if only for a short period of time before she pushed him off, overcame her will, is a sufficient act of force to support the jury's finding under section 261, subdivision (a)(2). (See e.g., *People v. Asencio, supra,* 166 Cal.App.4th at pp. 1205-1206 [finding that defendant's acts of pulling down the victim's underwear and rolling his adult body on top of the child victim, pinned and immobilized the victim and thus were sufficient acts of force to support a finding under section 261, subdivision (a)(2).])

Second, it is clear that K.S.'s will was overcome at least momentarily by her fear of Fonseca. When she woke up during the rape, she testified that she was too afraid to scream. The jury could have inferred that K.S.'s fear prevented any immediate efforts to resist Fonseca's actions. *Iniguez* is illustrative on this point. There the Supreme Court found sufficient evidence that the sexual intercourse was accomplished against the victim's will by means of fear of immediate and unlawful injury to support a conviction under section 261, former subdivision (2) (now subd. (a)(2)). The victim was sleeping at her friend's house. The defendant, whom the victim had met just that night, approached her as she slept, fondled her buttocks, and had sexual intercourse with her. The court concluded there was substantial evidence of the victim's genuine, subjective fear; she testified that she awoke and froze because she was afraid, and an investigating officer testified that the victim told him that she did not move because she feared defendant. The court also concluded that fear could be inferred from the circumstances. After the attack, the victim was distraught—she hid in the bushes outside the house. Further, there was substantial evidence that her fear was reasonable. Defendant, who weighed almost twice as much as the victim, accosted her in the house of a close friend. (*Iniguez, supra*, 7 Cal.4th at pp. 851-852, 857-858.) The Supreme Court further observed "[a]ny man or woman awakening to find himself or herself in this situation could reasonably react with fear of immediate and unlawful bodily injury. Sudden, unconsented-to groping,

disrobing, and ensuing sexual intercourse while one appears to lie sleeping is an appalling and intolerable invasion of one's personal autonomy that, in and of itself, would reasonably cause one to react with fear." (*Id.* at p. 858.)

Finally, the evidence was sufficient to prove duress. The rape occurred when K.S., who had "learning disabilities," and was described as mentally slow for her age, was 13 years old in the 6th grade. Fonseca was 32 years old. When she awoke during the rape, Fonseca said to her: "I'll make you feel like a woman." K.S. did not respond or immediately resist and was too scared to scream. Fonseca continued his conduct for a short amount of time until K.S. pushed him off. The jury could have concluded that the rape continued under duress based on the facts that Fonseca was older and larger than K.S. combined with her fear and limited intellectual level. All of these circumstances support a finding of duress within the meaning of section 261.

In view of the foregoing, we conclude sufficient evidence supported Fonseca's conviction on Count 2 a violation of section 269, subdivision (a)(1) based on an act of rape as defined under section 261, subdivision (a)(2)—sexual intercourse accomplished against a person's will by means of force, violence, duress, menace or fear of immediate and unlawful bodily injury.[6]

***DISPOSITION***

The judgment is affirmed.

**WOODS, Acting P. J.**

**We concur:**

**ZELON, J.** **JACKSON, J.**

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[6] Based on our conclusion that sufficient evidence supports Fonseca's conviction on Count 2, we do not reach the merits of Fonseca's two other issues on appeal concerning the sentencing enhancement under section 12022.8. These additional claims are entirely dependent upon the success of Fonseca's argument as to Count 2.